No. 20724

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ACRON INVESTMENTS, INC., VELTURON CORPORATION, METRIM CORPORATION, FULLERTON COUNTRY CLUB, C. S. JONES, EDITH B. JONES, LOS COYOTES COUNTRY CLUB, BELLEHURST COUNTRY CLUB, KENNETH G. WALKER and NANCY M. WALKER,

Appellants,

vs.

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION,

Appellee.

Appeal From the District Court for the Southern District of California, Central Division.

APPELLEE'S BRIEF.

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TOPICAL INDEX

Page

TABLE OF AUTHORITIES CITED

Page

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APPELLEE'S BRIEF.

The question presented is whether plaintiff and appellee Federal Savings and Loan Insurance Corporation (hereinafter sometimes referred to as "the Insurance Corporation") is an agency of the United States within the meaning of Section 1345 of Title 28 U.S.C. so as to give the District Court original jurisdiction over the instant suit.

Jurisdictional Statement.

The complaint seeks primarily to foreclose numerous deeds of trust. Jurisdiction was invoked under 28 U.S.C. § 1345. Defendants and appellants Velturon Corporation *et al.* and defendants and appellants Kenneth G. and Nancy M. Walker separately moved to dismiss the action for alleged lack of jurisdiction over the subject matter. The District Court denied the motions but by its order certified the question of jurisdiction to this Court under the authority of 28 U.S.C. § 1292(b). Both sets of defendants then applied to this Court for leave to appeal from said order, and such leave was granted.

Summary of Argument.

The Federal Savings and Loan Insurance Corporation is a corporate instrumentality of the United States created by Congress in 1934 for the purpose of insuring the safety of savings placed with local thrift and home-financing institutions. In 1955, Congress declared by statute that the Insurance Corporation should be an independent agency in the executive branch of the Government, and it has continued as such to the present time. The District Court has jurisdiction under 28 U.S.C. § 1345 over "all civil actions . . . commenced by . . . any agency" of the United States. The Insurance Corporation is an agency of the United States because it is either an independent establishment of the United States or a corporation in which the United States has a proprietary interest within the definition of the term

"agency" contained in 28 U.S.C. § 451. As a governmental corporation performing exclusively governmental functions, it also qualifies as an agency of the United States independently of the definition of that term in 28 U.S.C. § 451. Neither Section 1345 nor Section 451 of Title 28 U.S.C. is restricted in any way by Section 1349 of that title. Section 1349 is a limitation on jurisdiction based solely upon Federal incorporation as presenting a Federal question. The 1954 amendment to Section 1725(c) of Title 12 U.S.C. does not preclude jurisdiction of the District Court over this case, and California law cannot derogate from jurisdiction expressly conferred upon the Federal courts.

ARGUMENT.

I.

Appellee Insurance Corporation Is Either an Independent Establishment of the United States or a Corporation in Which the United States Has a Proprietary Interest Within the Meaning of Section 451 of Title 28 United States Code and Therefore an Agency of the United States Within the Meaning of Section 1345 of Title 28 United States Code.

A. The Federal Savings and Loan Insurance Corporation — What It Is and What It Does.

Congress established the Federal Savings and Loan Insurance Corporation in 1934 under Title IV of the National Housing Act as "an instrumentality of the United States" for the purpose of insuring the safety of savings placed with local thrift and home-financing institutions.[1] Insurance was then, and still is, mandatory for Federal savings and loan associations and optional for state-chartered institutions. Act of June 27, 1934, c. 847, § 403(a), 48 Stat. 1257; 12 U.S.C. § 1726(a). Under Section 402(c) of the Act, 48 Stat. 1256, the Insurance Corporation was to have succession until dissolved by Act of Congress, that is to say, it was to exist only so long as Congress willed that it should exist; and that provision still remains in the statute. 12 U.S.C. § 1725(c), as amended. Initially, the Corporation's operations were placed under the direction of a board of trustees consisting of the members of the Federal Home Loan Bank Board.[2] Act of June 27, 1934, c. 847, § 402(a), 48 Stat. 1256.

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[1]Act of June 27, 1934, c. 847, §§ 402(a), 402(c) and 403(a), 48 Stat. 1256; 12 U.S.C. §§ 1725(a), 1725(c) and 1726(a).

[2]The Federal Home Loan Bank Board was created under Section 17 of the Federal Home Loan Bank Act, Act of July 22,

The capital stock of the Insurance Corporation, in the amount of $100 million, was subscribed for by the Home Owners' Loan Corporation (hereinafter sometimes referred to as "the HOLC").[3] In 1948, all of the HOLC's interest in the Insurance Corporation's stock was transferred to the Secretary of the Treasury; and by July 1958, all of the stock had been retired through annual payments to the Treasury. (See pp. 12-13, *infra.*)

Effective July 27, 1947, the Insurance Corporation, the HOLC, the Federal Housing Administration, the United States Housing Authority, the Defense Homes Corporation and the United States Housing Corporation, and their respective functions, together with the functions of the Federal Home Loan Bank Board (and certain other functions), were consolidated into a single agency known as the Housing and Home Finance Agency. Section 1 of Reorg. Plan No. 3 of 1947, 12 F. R. 4981, 61 Stat. 954, note under 5 U.S.C. § 133y-16. The Housing and Home Finance Agency was in turn divided into three constituent agencies, viz., the Home Loan Bank Board, the Federal Housing Administration and the Public Housing Administration (*idem.*); and all of the functions of the Federal Home Loan Bank Board, the Board of Trustees of the Federal Savings and Loan Insurance Corporation, and the Board of Directors of

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1932, c. 522, 47 Stat. 736, to supervise the Federal Home Loan Banks established under that Act. Later, under sections 2 and 5 of the Home Owners' Loan Act of 1933, Act of June 13, 1933, c. 64, 48 Stat. 128, 132, the Federal Home Loan Bank Board was empowered to charter, regulate and supervise Federal savings and loan associations. See 12 U.S.C. §§ 1462, 1464.

[3]Although the stock was subscribed for in the name of the HOLC, 12 U.S.C. § 1725(b), all of the stock in the HOLC was owned by the United States. Section 4(b) of the Home Owners' Loan Act of 1933, 48 Stat. 129.

the HOLC (plus certain other functions) were, by Section 2 of said Reorganization Plan, transferred to the Home Loan Bank Board.

As of August 11, 1955, pursuant to the Act of August 11, 1955, c. 783, § 109(a)(3), 69 Stat. 640, Section 17 of the Federal Home Loan Bank Act was amended to add subsection (b) thereto. 12 U.S.C. § 1437(b). Under this amendment the Home Loan Bank Board ceased to be a constituent agency of the Housing and Home Finance Agency and became "an independent agency (including the Federal Savings and Loan Insurance Corporation) in the executive branch of the Government." In addition, the Board was renamed the Federal Home Loan Bank Board. This statutory scheme has continued to the present time.

From the foregoing brief history, the Court can see that the Insurance Corporation has from its inception been an integral part of the United States Government.

B. Legislative History and Interrelationship of Sections 1345 and 451 of the Judicial Code.

Section 1345 of Title 28 U.S.C. was enacted in 1948 and provides as follows:

> "§ 1345. United States as plaintiff
>
> Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress. June 25, 1948, c. 646, 62 Stat. 933."[4]

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[4]Congress has enacted special legislation authorizing civil actions commenced by the Insurance Corporation. Section 402(c) of

Section 1345 has its roots in the First Judiciary Act, which gave the district courts jurisdiction, concurrent with the state courts, "of all suits at common law where the *United States* shall sue" (emphasis added), subject to a jurisdictional amount requirement of $100.[5] The Act gave the circuit courts jurisdiction, likewise concurrent, "of all suits of a civil nature at common law or in equity," subject to a jurisdictional amount requirement of $500.[6]

In 1815, both the district courts and the circuit courts were given jurisdiction of "all suits at common law" where either "the United States, *or any officer thereof*, under the authority of an act of Congress, shall sue" (emphasis added); and the requirement of the jurisdictional amount in such suits was dropped.[7]

When the circuit courts were abolished in 1911, their jurisdiction in suits by the United States was trans-

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the National Housing Act, as amended, 12 U.S.C. § 1725(c), as amended, declares in part that

> "On June 27, 1934, the [Federal Savings and Loan Insurance] Corporation shall become a body corporate and shall be an instrumentality of the United States, and as such shall have power . . . (4) to sue and be sued, complain and defend, in any court of competent jurisdiction in the United States or its Territories or possessions or the Commonwealth of puerto Rico, . . ."

Appellee has never contended, as appellants Walker claim (Op. Br. pp. 4-5), that this section, standing by itself, invests the District Court with jurisdiction of this action.

[5]Act of September 24, 1789, § 9, 1 Stat. 73, 77.

[6]*Ibid.*, § 11, 1 Stat. 78.

[7]Act of March 3, 1815, § 4, 3 Stat. 244, 245. The Judiciary Act of 1875 restored the $500 amount requirement in the circuit courts in suits at common law as well as in equity "in which the United States are plaintiffs or petitioners." Act of March 3, 1875, § 1, 18 Stat. 470. Twelve years later, the requirement of a jurisdictional amount was permanently eliminated. Act of March 3, 1887, 24 Stat. 552; corrected by Act of August 13, 1888, 25 Stat. 433.

ferred to the district courts. To it was added cognizance of all civil actions, equitable as well as legal, brought by Federal officers "authorized by law to sue."[8]

Finally,[9] in 1948, the "Word 'agency' was inserted in order that this section shall apply to actions by agencies of the Government and to conform with special acts authorizing such actions." Reviser's Note to 28 U.S.C. § 1345.[10]

Thus, the legislative history of this section and its forerunners show that Congress has steadily widened the jurisdiction of the Federal trial courts over civil litigation instituted by the Federal Government. When the word "agency" was added in 1948, the last obstacle to Federal access to the national courts was removed. In light of this history, we submit that in deciding this appeal the Court should favor a broad construction of Section 1345 of Title 28, a construction in keeping with the manifest intent of Congress to open wide the Federal courts to civil suits brought by any arm of the United States.[11]

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[8]Act of March 3, 1911, § 24, 36 Stat. 1087, 1091.

[9]The statutory development of 28 U.S.C. § 1345, as set forth herein, has been taken from *Hart & Wechsler, The Federal Courts and the Federal System* (1953) at pages 1107-1108.

[10]The Reviser's Note is actually made a part of the House Report (No. 308) accompanying the bill (H.R. 3214, 80th Congress, Second Session) which brought about the 1948 revision of the Judicial Code. Such Reviser's Notes are regarded as authoritative in interpreting the meaning of the Code. *United States v. National City Lines* (1949), 337 U.S. 78, 81; *United States ex rel. Almeida v. Baldi* (3d Cir. 1952), 195 F. 2d 815, cert. den. (1953), 345 U.S. 904, reh. den. (1953), 345 U.S. 946. Despite the authoritative character of the Reviser's Notes, appellants make no reference to any of them in their briefs.

[11]In this connection, it should be observed that the Insurance Corporation is performing a governmental function "as part of an economical system set up by Congress for the benefit of the people

Section 451 of Title 28 U.S.C. was also enacted in 1948 and provides in pertinent part as follows:

"§ 451. Definitions

As used in this title:

* * *

"The term 'agency' includes any department, independent establishment, commission, administration, authority, board or bureau of the United States or any corporation in which the United States has a proprietary interest, unless the context shows that such term was intended to be used in a more limited sense. June 25, 1948, c. 646, 62 Stat. 907."

The Reviser's Note to Section 451 explains that "The definitions of agency and department conform with such definitions in section 6 of revised Title 18, Crimes and Criminal Procedure." The significance of this reference to Section 6 of Title 18 insofar as the question presented for decision here is concerned is pointed out at pages 13-15, *infra*.

Appellants Acron *et al.* contend (Op. Br. pp. 5, 9, 12) that whenever a government corporation is alleged to be an agency of the United States for purposes of jurisdiction, it can qualify as such only under the last clause of 28 U.S.C. § 451 referring to "any corporation in which the United States has a proprietary interest." In defining the term "agency," however, the statute is phrased in the disjunctive. In other words, a government corporation may be a corporation in which the United States has a proprietary interest *or* it may fit

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as a whole." *Federal Savings and Loan Insurance Corp. v. Edison Sav. and Loan Ass'n* (S.D. N.Y. 1949), 83 F. Supp. 1007, 1009, aff'd (2d Cir. 1949), 177 F. 2d 638.

within one of the previous categories mentioned in the section, such as being an independent establishment of the United States. Hence, if the Insurance Corporation qualifies under any one of the disjunctive definitions in Section 451, it is an agency for purposes of Title 28.

C. The Federal Savings and Loan Insurance Corporation Is an Independent Establishment of the United States as Defined in 28 United States Code, Section 451.

Section 17(b) of the Federal Home Loan Bank Act, 12 U.S.C. § 1437(b), added to said Act by the Act of August 11, 1955, c. 783, 69 Stat. 640, provides in part as follows:

> "§ 1437. *Federal Home Loan Bank Board; creation; composition; powers and duties; salaries; independent agency; report to Congress*"
>
> * * *
>
> "(b) The Home Loan Bank Board which was, pursuant to Reorganization Plan Numbered 3 of 1947, established and made a constituent agency of the Housing and Home Finance Agency shall, from August 11, 1955, cease to be such a constituent agency and shall be an independent agency (including the Federal Savings and Loan Insurance Corporation) in the executive branch of the Government: . . . The name of the Home Loan Bank Board is changed to 'Federal Home Loan Bank Board.' "

By this statute Congress has expressly defined the status of the Federal Savings and Loan Insurance Corporation to be that of an independent agency in the executive branch of the Government. An independent agency in the executive branch of the Government is

clearly an "independent establishment of the United States," and therefore the Insurance Corporation fits within one of the definitions of the term "agency" found in 28 U.S.C. § 451. On this basis alone, the Insurance Corporation, as an agency of the United States, falls within the purview of Section 1345 of Title 28 U.S.C. and is entitled to invoke the jurisdiction of the District Court.

Appellants Walker (Op. Br. pp. 28-29) belabor the point that Section 1437(b) of Title 12 U.S.C. does not constitute an independent grant of jurisdiction to sue in the District Court. Appellee agrees. The fact remains, however, that under the first sentence of this section Congress has made the Insurance Corporation an independent agency in the executive branch of the Government; wherefore, the Corporation falls within the ambit of 28 U.S.C. § 451, and thus is entitled to the benefit of 28 U.S.C. § 1345.

D. The Federal Savings and Loan Insurance Corporation Is a Corporation in Which the United States Has a Proprietary Interest as Defined in 28 United States Code, Section 451.

"Agency," as defined in 28 U.S.C. § 451, includes any corporation in which the United States has "a proprietary interest." The United States not only has *a* proprietary interest in the Insurance Corporation — it has the *entire* proprietary interest in such Corporation.

The Insurance Corporation was created by Congress in 1934 under Section 402(a) of the National Housing Act, 12 U.S.C. § 1725(a). The Corporation's capital structure was set out in Section 402(b) of said Act, 12 U.S.C. § 1725(b). It was to have a capital stock of

$100,000,000, and this stock was to be subscribed and paid for *in toto* by the Home Owners' Loan Corporation.

In 1948, all of the right, title and interest of the HOLC in the capital stock of the Insurance Corporation was transferred to the Secretary of the Treasury pursuant to the Government Corporations Appropriation Act of 1949, 62 Stat. 1183, 1189.

In 1950, a new subsection (Subsection (h)) was added to Section 402 of the National Housing Act, 12 U.S.C. § 1725(h), which directed the Insurance Corporation "to pay off and retire annually at par an amount of its capital stock equal to 50 per centum of its net income for the fiscal year." By July 1958, the stock had been retired in full. The Federal Home Loan Bank System (1961) page 26 (Library of Congress Catalog Card Number 61-60073).[12]

When, in 1948, the HOLC transferred all of the Insurance Corporation's stock to the Secretary of the Treasury, such transfer vested in the United States the entire proprietary interest in the Insurance Corporation; and although the stock was later retired in full, the United States was still left with the entire proprietary interest in the Corporation. Stated otherwise, the retirement of all the stock of the Insurance Corporation, completed in July 1958, did not serve to transfer the Corporation's ownership from the United States to some other entity, in the absence of an Act of Congress effecting such a transfer. This conclusion is buttressed by the fact that under Section 402(c) of the National Housing

[12]The court may take judicial notice of this official publication. *Greeson v. Imperial Irrigation District* (1932), 59 F. 2d 529.

Act, as amended, 12 U.S.C. § 1725(c), as amended, Congress can dissolve the Insurance Corporation at any time. Such power of dissolution residing solely in the Congress of the United States negatives the existence of a proprietary interest in the Corporation on the part of anyone other than the United States.[13]

That the Insurance Corporation is an agency of the United States because it is a corporation in which the United States has a proprietary interest is further demonstrated by certain of the Reviser's Notes to the Judicial Code. As heretofore mentioned, the Reviser's Note to Section 451 of Title 28 explains that "The definitions of agency and department conform with such definitions in section 6 of the revised Title 18, Crimes and Criminal Procedure." The Reviser's Note to Section 6 of Title 18 contains a significant statement as to what Congress intended when it used the phrase "corporation in which the United States has a proprietary interest" in Section 451. In this regard the Reviser says:

> "The phrase 'corporation in which the United States has a proprietary interest' is intended to include *those governmental corporations in which stock is not actually issued,* as well as those in which stock is owned by the United States. It excludes those corporations in which the interest of the Government is custodial or incidental."[14] (Emphasis supplied.)

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[13]*Cf. Fahey v. O'Melveny & Myers* (9th Cir. 1952), 200 F. 420, 444, 470. It should be noted that each insured institution has, under existing law, a contingent interest limited to certain secondary reserves of the Corporation with respect to which that institution has made specific payments. 12 U.S.C. § 1727(d), (e), (f) and (g).

[14]Since the definition of the term "agency" found in Section 451 of Title 28 conforms with the definition of that term

That the Insurance Corporation is a governmental corporation performing a governmental function is beyond cavil, if only because of the brief recital of facts set forth under Point A above. The Government Corporation Control Act, Act of December 6, 1945, c. 557, 59 Stat. 597, 31 U.S.C. §§ 841 *et seq.* characterizes it as a "Government corporation." Subchapter II of that Act is entitled "WHOLLY OWNED GOVERNMENT CORPORATIONS." The first section of the subchapter, 31 U.S.C. § 846, as amended, defines the term "wholly owned Government corporation" to include the Federal Savings and Loan Insurance Corporation.[15] The purpose of the Government Corporation Control Act is to bring *Government corporations* and their transactions and operations under annual scrutiny by Congress and provide current financial control thereof. 31 U.S.C. § 841.[16] The cases also hold that the Insurance Corporation is a governmental corporation performing governmental functions. *Federal Savings and Loan Ins. Cory v. Third National Bank* (6th Cir. 1946), 153 F. 2d 678, 679-680; *Federal Savings and Loan Ins. Corp. v. Kearney Trust Co.* (8th Cir. 1945), 151 F. 2d 720, 725; see *Keifer & Keifer v. Reconstruction Finance Corp.* (1939), 306 U.S. 381, 390, Footnote 3; *cf. Fahey v.*

found in Section 6 of Title 18, the above-quoted Reviser's Note to Section 6 is equally applicable in construing Section 451.

[15]Under Section 402(h) of the National Housing Act, 12 U.S.C. § 1725(h), the fact that the Insurance Corporation's capital stock has now been retired does not affect the applicability to said Corporation of the Government Corporation Control Act. For more details concerning the retirement of this stock, see pages 12-13, *supra.*

[16]Appellee has never claimed that the Government Corporation Control Act is "a grant of jurisdiction to the United States District Court," as hypothesized by appellants Walker at pages 7-8 of their opening brief.

O'Melveny & Myers (9th Cir. 1952), 200 F. 2d 420, 446-447 (similar conclusion reached with respect to the Federal Home Loan Banks, which are also subject to control and supervision by the Federal Home Loan Bank Board). See also Point II, *infra* [17]

Since the Reviser's Note states that the phrase "corporation in which the United States has a proprietary interest" includes governmental corporations "in which stock is not actually issued," the Insurance Corporation falls within this category because now that its stock has been retired, the Corporation is in exactly the same position as if none of its stock had ever been issued.

In this connection, appellants Acron *et al.* maintain (Op. Br. p. 9) that to have a proprietary interest in a corporation, one must own stock therein. As observed in the Reviser's Note to Section 6 of Title 18, however, neither issuance nor ownership of stock is a prerequisite to qualification of a government corporation (such as the Insurance Corporation) as one in which the United States has a proprietary interest.[18] *Cf.*

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[17]This Court in the *Fahey* case expressly held that the Federal Home Loan Banks are governmental corporations performing governmental functions and not private corporations, although their stock is owned by the member savings and loan associations and like institutions. (200 F. 2d at pp. 446, 447, 454, 455, 467, 469 and 470.) The Insurance Corporation, none of whose stock is privately owned, is even more clearly a governmental corporation performing governmental functions. This effectively disposes of appellants Walkers' contention (Op. Br. pp. 32-33) that the Insurance Corporation is akin to a private business corporation.

[18]Appellants Walker (Op. Br. pp. 27, 33) characterize the Insurance Corporation as one which "operates at a profit". If they mean that the Corporation's gross receipts are larger than its gross expenses to date, they are correct, and this must continue to be the case if there is to be an insurance fund to protect the public's savings. If, however, they mean that the Corporation exists solely for the purpose of earning sufficient income to pay dividends to its owners, they are wrong.

such other nonstock government corporations as Federal Prison Industries, Incorporated, 18 U.S.C. §§ 4121 *et seq.;* Saint Lawrence Seaway Development Corporation, 33 U.S.C. §§ 981 *et seq.;* and Virgin Islands Corporation, 48 U.S.C. §§ 1407 *et seq.,* each of which is nonetheless defined as a "wholly owned Government corporation" under Section 101 of the Government Corporation Control Act, 31 U.S.C. § 846, as amended.

It is clear from the foregoing that the Insurance Corporation has more than met the minimal standard imposed by the last clause of Section 451 of Title 28 U.S.C. which merely requires that the United States have *a* proprietary interest in a corporation in order to qualify it as an "agency."[19]

II.

The Insurance Corporation Should Be Regarded as an Agency of the United States Within the Meaning of 28 United States Code, Section 1345, Independently of the Limited Definition of the Term "Agency" in 28 United States Code, Section 451.

Appellants Acron *et al.* contend (Op. Br. pp. 5, 8) that the Insurance Corporation's status as an agency within the meaning of 28 U.S.C. § 1345 depends entirely upon whether it is an agency as defined in 28 U.S.C. § 451. Section 451 does not, however, purport to contain an exclusive definition of the term "agency" as used in Title 28. The section declares that the term "includes" certain Governmental subdivisions, *e.g.,* departments, independent establishments, commissions, boards,

[19]The proprietary interest of the United States must, however, be more than custodial or incidental. See page 13, *supra.*

etc., as well as corporations in which the United States has a proprietary interest. Assuming that the word "includes" is used in its normal sense as suggesting that something forms a constituent or subordinate part of a whole (Webster's New Collegiate Dictionary, 2d. Ed. 1953), the section does not purport to give an all inclusive definition of "agency" as that term is used in Title 28. Accordingly, in determining whether the Insurance Corporation is an agency of the United States for the purpose of invoking the District Court's jurisdiction under 28 U.S.C. § 1345, this Court is not limited to the definition of the word "agency" appearing in 28 U.S.C. § 451 but may also consider those incidents and attributes of the Insurance Corporation's creation, existence and operation which show the extent to which Congress intended that it should be viewed as an integral arm of the United States Government. Such an approach is consonant with the Congressional pattern of action in enlarging access to the Federal courts by the United States and the instrumentalities created by Congress to carry on the Government's business. See Point 1B above.

Apart from the fact that the Federal Home Loan Bank Act has declared that the Insurance Corporation shall be an independent agency in the executive branch of the Government, the National Housing Act creating the Insurance Corporation expressly makes it "an instrumentality of the United States." 12 U.S.C. 1725 (c), as amended. Webster's New Collegiate Dictionary (2d. Ed. 1953) defines "instrumentality" as meaning "agency." The courts, too, use these terms interchangeably. Thus, in *Federal Land Bank v. Priddy* (1935),

295 U.S. 229, the Supreme Court of the United States said at page 231:

> ". . . this Court has already had occasion to consider the organization and functions of federal land banks, and to declare that they are *instrumentalities of the federal Government,* engaged in the performance of an important governmental function." (Citing cases.) "As such, so far as they partake of the sovereign character of the United States, Congress has full power to determine the extent to which they may be subjected to suit and judicial process." (Citing case.) "Whether *federal agencies* are subject to suit and, if so, the extent to which they are amenable to judicial process, is thus a question of congressional intent." (Emphasis added.)

Furthermore, the Insurance Corporation is under the direction of, and operated by, a three man Board, *i.e.*, the Federal Home Loan Bank Board, Section 402(a) of the National Housing Act, 12 U.S.C. § 1725(a), whose members are appointed by the President of the United States, by and with the advice and consent of the Senate. 1947 Reorg. Plan No. 3, as amended Aug. 10, 1948, c. 832, Title V, § 501(a), 62 Stat. 1283. The Corporation is entitled to the use of the United States mails for its official business in the same manner as the executive departments of the Government. Section 402(c) of the National Housing Act, as amended, 12 U.S.C. § 1725(c), as amended; Act of September 2, 1960, 39 U.S.C. §§ 4151, 4152 and 4156. It may also avail itself of the use of information, services and facilities of other Government departments or instrumentalities. 12 U.S.C. § 1725(c). It is subject to audit

by the General Accounting Office. Act of December 6, 1945, c. 557, 59 Stat. 597, 31 U.S.C. §§ 841 *et seq.* Monies of the Corporation not required for current operations are deposited in the United States Treasury or, with the approval of the Secretary of the Treasury, may be deposited with a Federal Reserve Bank or a bank designated as a depositary or fiscal agent of the United States, or they may be invested in obligations of the United States. Section 402(d) of the National Housing Act, 12 U.S.C. § 1725(d); Section 302 of the Government Corporation Control Act, 31 U.S.C. § 867. When designated for that purpose by the Secretary of the Treasury, the Corporation shall be a depositary of public money and may also be employed as fiscal agent of the United States. (*Idem.*) Except as to its real property, the Corporation is exempt from taxation by the United States or any State or other taxing authority. Section 402(e) of the National Housing Act, 12 U.S.C. § 1725(e). All notes, bonds, or other obligations issued by it are exempt from taxation, excepting surtaxes, estate, inheritance, and gift taxes. (*Idem.*) The Corporation may borrow up to $750,000,000 at any one time from the Treasury of the United States. Section 402(i) of the National Housing Act. 12 U.S.C. § 1725(i). All such loans are treated as public-debt transactions of the United States. (*Idem.*) Finally, the Corporation may be dissolved at any time by Act of Congress, which emphasizes the fact that no private person or institution has any interest in this purely Governmental corporation. Section 402(c) of the National Housing Act, as amended, 12 U.S.C. § 1725(c), as amended.

The above-mentioned factors demonstrate that the Insurance Corporation is an integral arm of the Fed-

eral government; wherefore, it must be regarded as an agency of the United States entitled to the jurisdictional privileges accorded by 28 U.S.C. § 1345.

The Court of Appeals for the Tenth Circuit came to a similar conclusion in an analogous situation involving the Federal Deposit Insurance Corporation (hereinafter sometimes referred to as "the FDIC"), the counterpart of the Insurance Corporation for commercial banking. *Freeling v. F.D.I.C.* (10th Cir. 1963), 326 F. 2d 971, affirming *per curiam* on the basis of the opinion below, *Freeling v. F.D.I.C.* (N.D. Okl. 1962), 221 F. Supp. 955.

On of the questions there raised was whether the FDIC was a "Federal agency" within the meaning of the Federal Tort Claims Act, Act of August 2, 1946, c. 753, 60 Stat. 842. "Federal agency" is defined in 28 U.S.C. § 2671 dealing with Tort Claims Procedure as including "the executive departments and independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States but does not include any contractor with the United States," a definition which is no broader than that set forth in 28 U.S.C. § 451.[20]

The Court in *Freeling* held that the FDIC was a "Federal agency" within the meaning of 27 U.S.C. § 2671. This holding (221 F. Supp. at p. 956) was based on the statutory provisions creating the FDIC. 12 U.S.C. §§ 1811 *et seq.* The district court pointed out that two of the three members of the Board of Directors of the FDIC are appointed by the President; that the Secretary of the Treasury has to approve certain

[20]This is particularly true if the use of the word "agencies" in 28 U.S.C. § 2671 requires resort to the definition of "agency" in 28 U.S.C. § 451.

of its investments; and that it has to report annually to Congress as to its financial condition. The court also relied on the fact that the FDIC was regarded as a "mixed-ownership government corporation" under the Government Corporation Control Act, *supra*, whose financial transactions were required to be audited annually by the General Accounting Office.[21]

All the indicia employed by the Court in *Freeling* to establish that the FDIC is a "Federal agency" are, as shown above, also present with respect to the Insurance Corporation. Indeed, as set forth at page 14, *supra,* the Insurance Corporation has been classified by Congress as a "wholly owned Government corporation" and not merely one of "mixed-ownership." On the basis of *Freeling* alone, this Court should hold that the Insurance Corporation is an "agency" within the meaning of 28 U.S.C. § 1345, and that therefore the District Court has jurisdiction of the instant action.

III.

Section 1349 of Title 28 United States Code in No Way Limits the Meaning of the Word "Agency" as That Term is Used in 28 United States Code, Section 1345, and Defined in 28 United States Code, Section 451.

Both sets of appellants contend (Acron Op. Br. pp. 9-10; Walker Op. Br. p. 28) that Section 1349 of Title 28 U.S.C. in some way restricts or governs the meaning of the word "agency" as that term appears in Section 451 of Title 28 and in Section 1345 of the same

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[21]See also *Pearl v. United States* (10th Cir. 1956), 230 F. 2d 243, 245; *Handley v. Tecon Corp.* (N.D. N.Y. 1959), 172 F. Supp. 565, 568; *Wickman v. Inland Waterways Corporation* (D.C. Minn. 1948), 78 F. Supp. 284.

title. Such contention is palpably unsound, as can be easily demonstrated.

Section 1349 of Title 28 U.S.C. provides as follows:

> "§1349. *Corporation organized under federal law as party.*
>
> The district courts shall not have jurisdiction of any civil action by or against any corporation upon the ground that it was incorporated by or under an Act of Congress, unless the United States is the owner of more than one-half of its capital stock."

Section 1349 of Title 28 U.S.C. is not related to either 28 U.S.C. § 1345 or 28 U.S.C. § 451. Section 1349 by its own terms is a limitation upon jurisdiction based upon Federal incorporation. The statutory progenitor of the present Section 1349 of Title 28 U.S.C. was enacted in 1925. Act of February 13, 1925, c. 229, § 12, 43 Stat. 941. Prior thereto Federal incorporation was, unless withheld by Congress,[22] a ground for Federal jurisdiction when coupled with the necessary jurisdictional amount, on the theory that such incorporation raised a Federal question. See *Federal Civil Practice Handbook* (Calif. Cont. Ed. of the Bar 1961), page 105.

Section 1345 of Title 28 U.S.C., on the other hand, is an affirmative grant of Federal jurisdiction. It in no way relates to jurisdiction based on Federal incorporation. As we have demonstrated, *supra,* pages 6-10, 28 U.S.C. § 1345 represents the latest Congressional enactment opening the doors of the Federal courts to the United States and its instrumentalities regardless of the par-

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[22]See Act of July 12, 1882, c. 290, § 4, 22 Stat. 162 (national banks); Act of January 28, 1915, c. 12, § 5, 38 Stat. 803 (railroad corporations).

ticular question of law involved and regardless of jurisdictional amount. By this enactment on June 25, 1948, long after the limitation on Federal incorporation jurisdiction was adopted by the Act of February 13, 1925, Congress gave every "agency" of the United States the right to invoke Federal court jurisdiction where the agency, as here, had been expressly authorized to sue by Congress. How a section of the Judicial Code enacted in 1925 for the purpose of limiting Federal incorporation jurisdiction can affect a grant of jurisdiction enacted in 1948, which is unrelated to Federal incorporation, is difficult to understand. Indeed, the judicial decisions make it clear that where jurisdiction is based on a ground other than Federal incorporation, Section 1349 can have no application. *Elwert v. Pac. First Fed. Sav. & Loan Assn.* (E.D. Ore. 1956), 138 F. Supp. 395; *Patterson v. American Red Cross* (S.D. Fla. 1961), 101 F. Supp. 655. Since jurisdiction here rests upon another ground of jurisdiction, namely, 28 U.S.C. 1345, Section 1349 of 28 U.S.C. has no application.

Appellants Acron *et al.* argue (Op. Br. pp. 9-10) that the phrase "corporation in which the United States has a proprietary interest" found in 28 U.S.C. § 451 is restricted to a corporation in which the United States owns more than one-half of the stock in light of 28 U.S.C. § 1349. This is absurd. Section 1349 does not even use the word "agency." It is concerned only with whether the United States owns more than 50% of a Federally organized corporation. Section 451, on the other hand, is concerned with a definition of the term "agency" and includes within that definition a corporation in which the United States need have only a proprietary interest.

Appellants Walker rely heavily (Op. Br. pp. 17-24) upon the opinion of the lower court in *Federal Savings and Loan Insurance Corporation v. Third National Bank* (M.D. Tenn. 1945), 60 F. Supp. 110, reversed (6th Cir. 1946), 153 F. 2d 678. Their reliance upon this decision as a precedent is misplaced. None of the grounds for Federal jurisdiction over the subject matter asserted in the *Third National Bank* case is relied upon by appellee as a ground for Federal jurisdiction in the instant case. Furthermore, that case was decided before Section 1345 of Title 28 U.S.C. was adopted in 1948. Accordingly, there the Insurance Corporation did not have the benefit of this more recent ground of jurisdiction in the district courts over suits commenced by any "agency" of the United States, which is the ground upon which appellee bases its claim of jurisdiction herein. Finally, the value of the district court's opinion in the *Third National Bank* case is dubious at best in light of the reversal by the Sixth Circuit.

IV.

Statutes Pertaining to Other Federal Corporations Are Not Apposite Here.

Appellants Acron *et al.* refer (Op. Br. pp. 10-12) by way of analogy to statutes creating three other Federal corporations and contrast them with the statute creating the Insurance Corporation in an effort to show that appellee cannot bring this suit in the District Court. Said appellants first mention the Commodity Credit Corporation created under the Act of June 29, 1948, c. 704, § 2, 62 Stat. 1070, 15 U.S.C. § 714. They call attention to Section 714b(c) of Title 15 U.S.C. empowering said corporation to sue and be sued and assert that the District Court's jurisdiction over such suits is expressly provided for in said section. They

argue in effect that if Congress had intended that the Insurance Corporation be allowed to sue in the District Courts, it would have specifically so provided in the statute creating the Corporation (12 U.S.C. § 1725 (c), as amended), as Congress allegedly did with reference to the Commodity Credit Corporation. In the case of the Commodity Credit Corporation, however, jurisdiction is vested *exclusively* in the District Courts by the terms of Section 714b(c), whereas the Insurance Corporation has the choice of suing in the Federal courts under 28 U.S.C. § 1345 or of suing in the State courts in an appropriate situation. In other words, Section 714b(c) of Title 15 U.S.C. is both a *limitation* on jurisdiction and a grant of jurisdiction, and appellants Acron *et al.* are in effect comparing "oranges and apples."

Said appellants next refer (Op. Br. p. 11) to the Federal Crop Insurance Corporation created under the Act of February 16, 1938, c. 30, Title V, § 503, 7 U.S.C. § 1503. They direct attention to Section 1506(d) of Title 7 U.S.C. containing a "sue and be sued" clause with regard to said corporation and assert that under the same section "jurisdiction is conferred upon such District Court to determine such controversies without regard to the amount in controversy."

Finally (Op. Br. p. 11), said appellants mention the Federal Deposit Insurance Corporation, originally created as a part of the Federal Reserve Act by Act of June 16, 1933, c. 89, § 8, 48 Stat. 168, 12 U.S.C. § 1811. Under 12 U.S.C. § 1819, the FDIC has power to "sue and be sued, complain and defend, in any court of law or equity, State or Federal." Later in the same section it is provided that such suits "shall be deemed

to arise under the laws of the United States." Said appellants seem to be urging that the absence of such a provision from the act creating the Insurance Corporation indicates an intention on the part of Congress that the Insurance Corporation be debarred from suing in the Federal courts, but they overlook the fact that the purpose of this "Federal question" provision in the statute creating the FDIC was not merely to confer jurisdiction on the District Court but to insure that Federal, as opposed to State, law would be applied in such a suit. *D'Oench, Duhme & Co. v. Federal Deposit Insurance Corporation* (1941), 315 U.S. 447, 468.

Appellants Acron *et al.* fail to mention that the Federal Crop Insurance Corporation and the Federal Deposit Insurance Corporation were both organized by Congress before June 25, 1948, when an "agency" of the United States was for the first time given the right to invoke the district court's jurisdiction under 28 U.S.C. § 1345. Hence, if the district courts were to have jurisdiction over actions commenced by either of said corporations at the time of their creation, it was necessary to make some express provision therefor. Moreover, if Congress were obliged to include a specific grant of Federal court jurisdiction in the statute creating every governmental instrumentality, as said appellants seemingly contend, the effect would be to render Section 1345 of Title 28 U.S.C. nugatory insofar as agencies of the United States are concerned.

The moral of all this is that statutes enacted at different times controlling the affairs of Government corporations performing such diverse functions as the regulation of commodity credit and the insuring of accounts in savings and loan associations will necessarily

vary in their language and approach. Because of these normal variations it is meaningless to analogize one statute with another and to attempt to spell out any consistent pattern of Congressional intent.

V.

Neither the 1954 Amendment to Section 1725(c) of 12 United States Code Nor the California Constitution Requires That This Action Be Commenced in the Superior Court of the State of California for the County of Orange.

Appellants Walker contend (Op. Br. pp. 10-11) that by the change in language in the August 2, 1954 amendment to Section 402(c)(4) of the National Housing Act, 12 U.S.C. § 1725(c)(4), Congress intended to limit the jurisdiction of the Federal courts over matters involving the Federal Savings and Loan Insurance Corporation. Implicit in this contention is the admission that prior to the 1954 amendment there *was* such Federal court jurisdiction.[23]

The purpose of the 1954 amendment to 12 U.S.C. § 1725(c)(4) was not, as said appellants suggest, to limit jurisdiction but, in the words of the Reviser's Note to that section, "to provide a method of service of process on the Corporation." The change of language in the "sue and be sued" clause was merely incidental to the main purpose of the amendment. The words "any court of competent jurisdiction" were no doubt designed to bring the section into conformity with modern Federal and State practice abolishing separate courts of law and equity. As we have demonstrated

[23]In light of this implied admission, the district court's pre-1954 decision in the *Third National Bank* case, relied on so heavily by appellants Walker, must have been erroneous.

under Points I and II above, the District Court is a court of competent jurisdiction insofar as the instant suit is concerned because of Section 1345 of Title 28 U.S.C.

Appellants Walker argue (Op. Br. pp. 11-14) that the only "court of competent jurisdiction" in which the instant suit may be maintained is the Superior Court of the State of California for the County of Orange, that being the county in which the real property sought to be foreclosed upon is situated. This argument is premised upon Section 5 of Article VI of California Constitution providing that all actions for the enforcement of liens upon real estate shall be commenced in the County in which the real estate is situated.

This State constitutional provision cannot be availed of to restrict a clear grant of jurisdiction to the Federal courts, such as that found in Section 1345 of Title 28 U.S.C. The jurisdiction of Federal courts over cases within the field of their jurisdiction cannot be enlarged, diminished or impaired by State statutes or regulations; and a person may not be deprived of his right to resort to the Federal courts by State legislation. As the United States Supreme Court observed in *Chicago and N. W. Railway Co. v. Whitton* (1871), 80 U.S. 270, 286:

> "In all cases, where a general right is thus conferred, it can be enforced in any Federal court within the State having jurisdiction of the parties. It cannot be withdrawn from the cognizance of such Federal court by any provision of State legislation that it shall only be enforced in a State court. *The statutes of nearly every State provide for the*

institution of numerous suits, such as for partition, *foreclosure,* and the recovery *of real property in particular courts and in the counties where the land is situated, yet it never has been pretended that limitations of this character could affect, in any respect, the jurisdiction of the Federal court over such suits. . . .*" (Emphasis supplied.)

See also *Akin v. Louisiana National Bank of Baton Rouge* (4th Cir. 1963), 322 F. 2d 749, 754 (Federal jurisdiction cannot be defeated by a state statute prescribing the court in which an action is to be brought); *Sacramento Municipal Utility District v. Pacific Gas and Electric Company* (1942), 20 Cal. 2d 684, 688.

VI.

Appellee's Attempt to Obtain Clarifying Legislation Is of No Relevance on This Appeal.

Appellants Acron *et al.* make much of the fact (Op. Br. pp. 12-14) that on March 29, 1966, a bill was submitted to the Speaker of the House of Representatives which included a provision clarifying the status of the Insurance Corporation as an agency of the United States within the meaning of Section 451 of Title 28 U.S.C. Said appellants even attach a copy of the proposed bill as an appendix to their brief. Apart from the questionable propriety of alluding to matters outside the record and arising subsequent to the making of the order herein appealed from, their reference to this bill has no significance. The United States Supreme Court has explicitly held that attempts to seek clarifying legislation do *not* give rise to an inference that the construction of a statute contended for is not the correct con-

struction. *Wong Yang Sung v. McGrath* (1949), 339 U.S. 33, 47-48; *United States v. Turley* (1956), 352 U.S. 407, 415, Footnote 14.

It is respectfully urged that the order appealed from should be affirmed.

Respectfully submitted,

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Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JOHN WHYTE